citba.org
Customs and International Trade Bar Association
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Message From the President

By Lawrence M. Friedman*

Greetings from Chicago,

I am proud to be the newest president of the Customs and International Trade Bar Association. As one of my first official acts, I thank and congratulate outgoing President Joe Dorn of King & Spaulding. During his tenure, Joe generously gave CITBA his time and energy, leadership, knowledge and the skill of a one of the true leaders of the trade bar. Joe's wit and no-nonsense presence will be missed. We wish him much joy.

I take on my role as president of CITBA from the perspective of a practitioner in Chicago. From here, it is easy to see that CITBA is a truly national bar association. A look through our membership list shows customs, trade, and export practitioners in Georgia, Florida, Texas, California, and elsewhere throughout the country. Internationally, there are CITBA members in Canada, Japan, the Netherlands, Australia, and Accra, Ghana. The practical consequences of our membership distribution, the location of the Court of International Trade, the Federal Circuit, and the various federal agencies dictate that CITBA will continue to focus our activities and events in New York and Washington. Nevertheless, we will strive to be in contact with all of our members and look for ways to leverage technology to include members in as many CITBA events as possible, regardless of where those members are located.

We are living in interesting times for international trade. The Trans-Pacific Partnership is moving toward implementation, trade relations with Cuba and Iran are warming, and the need for fair and efficient enforcement continues. CITBA will continue its efforts on behalf of members to remain engaged with the Court

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of International Trade, the Court of Appeals for the Federal Circuit, and all of the federal agencies that regulate trade including Customs and Border Protection, the Department of Commerce, the Department of Treasury, and the International Trade Commission. Through these efforts, we will continue represent the needs and interests of the customs, trade, and export bar.

Running CITBA is a group project that depends on the talent and efforts of our Board of Directors. I look forward to continuing to work with everyone on the Board including new Vice President Will Sjoberg. Please take the time to visit the CITBA web site to see who serves on the Board. It is truly an impressive group of lawyers from the private bar and government service. Also, please follow CITBA's twitter feed at @CITBAorg. Do not hesitate to contact me directly if you have suggestions for CITBA programs and events. I can be reached at lfriedman@barnesrichardson.com

**Lawrence M. Friedman is the President of CITBA and Partner at Barnes, Richardson & Colburn, LLP in Chicago.*

Upcoming Programs

37th Anniversary Georgetown International Trade Update
FEBRUARY 25-26
Georgetown University Law Center
Hart Auditorium
600 New Jersey Avenue, NW
Washington, DC 20001

The International Trade Update will give you practical, topical, and timely information that you can use back at your desk - whether you are a private practitioner, government attorney, or in-house counsel. The Update's agenda is coming soon.

CITBA is also planning several other events for which additional details will be available as soon as they are finalized, including:

Networking Happy Hour
MARCH/APRIL
Washington, DC
Joint event with other trade or bar associations.

Trade & Agriculture Program
MAY 3
Akin Gump Strauss Hauer & Feld LLP

1333 New Hampshire Ave NW
Washington, DC 20036

Past CITBA Events

USTR Lead Negotiator and Experts Discuss the Trade Services Agreement (TiSA) Negotiations
DECEMBER 9, 2015
12:30-2:00pm
Crowell & Moring
1001 Pennsylvania Avenue, NW
Washington, DC 20004

The Trade in Services Agreement (TiSA) is an international agreement currently being negotiated by countries representing 75 percent of global trade in services to liberalize trade in services, including finance, investment, insurance, legal services, and other emerging issues such as restrictions on cross-border data flows that can disrupt financial and e-commerce services. The negotiating countries recently agreed to hold four more rounds of negotiations in an effort to conclude the agreement by July 2016. Discussion was headed by two leading experts on TiSA and the lead U.S. negotiator on TiSA, fresh from the November/ December negotiating round focused on financial services in Geneva, discuss and answer questions on the major outstanding issues.

Announcements

NEWS FROM THE CLERK OF THE COURT OF INTERNATIONAL TRADE

By Cynthia Love, Sam Fong & Scott Warner*

Resolution Solutions

Every New Year brings new resolutions, so may we suggest resolving to cut down on the more common docketing mistakes this year? As the Clerk's Office is always looking to improve the quality of the docket, we thought we'd point out some of the more frequent filing mistakes we've seen in the past year:

Don't Stop at Pay.gov: When filing a summons, complaint or Notice of Appeal on the system, please remember that your docketing does not stop after you make your payment on Pay.gov. Keep in mind that until you get to the Notice of Electronic Filing page, your filing will not make it to the docket sheet.

Know the Formula for Combining and Separating Forms and Documents: When you're filing initiating documents or a Motion to Intervene, please resist the temptation to combine all of your different forms and documents into one docket event. Instead, take this approach: If the documents and forms are similar, such as multiple Form 17s, go ahead and combine them into one docket entry. If they're different, such as a Form 5, a Form 13 and a Complaint, please docket them separately and you'll help make the docket sheet much easier to navigate!

Decline to Combine Initiating Documents: To provide for a more legible docket sheet and to enable the system to generate necessary deadlines, please be sure to file your summons, Form 5, Form 11, Form 13, Form 17 and complaint as separate docket entries.

Become Even More Appealing: The next time you're filing a Notice of Appeal and are prompted to select the appropriate event(s) to which your appeal relates, be sure to both click on the appropriate checkbox for that event and type in the decision being appealed.

Lights, Camera, Caption: Please know that the instant the Clerk's Office receives your filings, the judges and chambers do too, so be sure to double check the caption, court number and judge's name on the documents before you file them.

Game, Set, Match the Docket Event: Please use the appropriate docket event when filing your documents. If you can't find a good match, give our CM/ECF Help Desk a call at: 1-866-450-1859.

Why Defy? Just Comply: When filing your briefs, memoranda or comments after remand, don't forget your Certificate of Compliance as required by paragraph 2 of Standard Chambers Procedures.

A Confidential Essential: If you wish to view or file confidential documents in a 1581(c) case, please remember that you must first become a Confidential Information Filer. If you already have a CM/ECF account, please submit a Request for Change in Information. If you don't, please submit a CM/ECF Registration Form. Both forms are available on the Court's website at: www.cit.uscourts.gov.

Picking Up Good Terminations: Did your 1581(c) case just come to an end? Were confidential documents filed in that case? If you answered yes to both, please file your Form 14 Joint Notice Regarding Termination of Access to Confidential Information within 28 days of final judgment, including appeals, per Section 15 of Administrative Order 02-01.

Cynthia Love is a Case Manager, Sam Fong is the Quality Control Administrative Analyst, and Scott Warner is the Operations Manager for Case Management at the Court of International Trade.

Federal Circuit and CIT Case Summaries

By Claudia Burke*

** Claudia Burke is an attorney with the Department of Justice, Civil Division, National Courts Section. These summaries are not a document of the U.S. Department of Justice, nor does it represent the official views of the Department of Justice.*

Customs

Federal Circuit Affirms Court of International Trade's Discretion to Decline to Issue Declaratory Relief to Ford. *Ford Motor Co. v. United States*, No. 2014-1726 (Dyk and O'Malley, JJ; Newman, J. dissenting). On February 3, 2016, a divided panel of the Court of Appeals for the Federal Circuit affirmed the Court of International Trade's decision not to exercise its declaratory power to take jurisdiction over Ford's challenge to the liquidation of its reconciliation entries. For those entries that the trial court held to be time barred under 28 U.S.C. 1581(i), the Federal Circuit held that the statute of limitations for section 1581(i) claims is not jurisdictional but also held that the trial court would have similarly declined to exercise its declaratory relief powers even if it had taken jurisdiction. Judge Newman dissented, stating that the Court should order the refund requested by Ford.

Federal Circuit Affirms Customs' Requirements for NAFTA Certificates of Origin. *Ford Motor Co. v. United States*, No. 2014-158 (Prost, CJ, and Lourie, J; Reyna, J, dissenting). On January 6, 2016, a divided panel of the Federal Circuit sustained Customs and Border Protection (CBP) refund procedures for duties paid on imports subject to the North American Free Trade Agreement (NAFTA). The panel majority held that CBP reasonably distinguished between refund requests depending on whether those claims were filed traditionally or through an electronic process known as "reconciliation." The majority determined that traditional refund claims and reconciliation claims are governed by different implementing statutes, and, thus, Customs was not inconsistent in its treatment of identical claims. Additionally, the majority held that, even if both types of claims were governed by the same statute, procedural differences among traditional and reconciliation claims justify treating the claims differently. Judge Reyna dissented, finding "no principled explanation" for CBP's treatment of NAFTA duty refund claims differently depending on whether those claims were filed traditionally or through the electronic "reconciliation" process.

AD/CVD

Federal Circuit Clarifies "Commercial Reality" Requirement in Antidumping Cases. *Nan Ya Plastics Corp., Ltd. v. United States*, [Prost, C.J., Lourie, J., *Wallach, J*]. On January 19, 2016, the Federal Circuit affirmed the Court of International Trade's decision sustaining Commerce's assignment of a 74.34 percent antidumping duty margin to Nan Ya Plastics, based on adverse facts available. However, the Court disagreed with the trial court's decision to the extent it held that Commerce was

required to corroborate the use of primary information - that is, information placed in the record in the current administrative action, as the statute does not require such analysis. The Court also clarified that the "commercial reality" requirement in administrative actions requires that the determination be "consistent with the method provided in the statute" but does not require Commerce to "determine the industry-wide 'commercial realities prevailing' during a certain time period."

Court of International Trade Sustains Commerce's "Differential Pricing" Methodology for Combatting "Masked" Dumping. *Apex Frozen Foods Pvt. Ltd, et al. v. United States* [Kelly, J.] On February 5, 2015, the Court of International Trade sustained Commerce's "differential pricing" methodology for identifying and remedying "masked" dumping in an administrative review of Commerce's antidumping order covering shrimp from India. The statute governing Commerce's proceedings authorizes Commerce to employ alternative calculation methodologies to account for masked dumping when it observes a pattern of significant price difference that cannot be accounted for by its usual methodologies. The "differential pricing" methodology-a procedure that Commerce started applying routinely in 2013-employs various statistical methods to satisfy the statutory criteria, as well as an alternative calculation methodology that allows Commerce to unmask the dumped sales previously hidden. The Court rejected the foreign exporters' numerous challenges to the new methodology and held that it was reasonable.

Court of International Trade Sustains in Part and Remands Commerce's Final Results Regarding the Antidumping Duty Order for Activated Carbon from China. *Calgon Carbon Corp. v. United States* [Restani, S.J.]. On January 20, 2016, the Court of International Trade sustained in part and remanded in part the final results of the Commerce's sixth annual review of the antidumping duty order covering Chinese activated carbon. Commerce used a value for a coal input from a previous proceeding rather than a higher, current rate proposed by domestic industry plaintiffs. The Court rejected the domestic industry's argument that its proffered rate was specific to the coal used by Chinese activated carbon producers, but found persuasive the domestic industry's argument that the rate from the previous proceeding was aberrationally low and remanded on that issue. In addition, the Court rejected the government's position that another party to the proceeding, Carbon Activated Corp. (CAC), failed to exhaust its administrative remedies on its claim that it should have been assigned a separate rate instead of the "all others" rate applied to companies presumed to be under Chinese government control. Because this "all others" rate was initially lower than the separate rate would have been, the Court held that CAC would have had no reason to challenge the rate administratively.

Court of International Trade Sustains Commerce's Application of Masked Dumping Methodology in Antidumping Duty Review of PET Film from Taiwan. *Nan Ya Plastics Corp. v. United States* [Ridgway, J.]. On December 31, 2015, the Court of International Trade denied the motion for judgment upon the administrative record filed by Nan Ya Plastics, seeking to overturn Commerce's application of its average to transaction methodology of calculating dumping margins as a result of Commerce's finding that Nan Ya had dumped sales that were "masked." Nan Ya argued that Commerce failed to consider evidence that the price variations were

the result of changes in raw material costs and not selective pricing to its customers in the United States. The Court held that the statute does not require Commerce to consider evidence that other factors could account for the pricing differences.

Court of International Trade Remands Commerce's Final Results of Administrative Review of the Countervailing Duty Order Covering Circular Welded Carbon Steel Pipes from Turkey. *Tosçelik Profil ve Sac Endüstrisi A.Ş. v. United States* [Musgrave, S.J.]. On December 21, 2015, the Court of International Trade remanded the final results of Commerce's 2012 annual review of the countervailing duty order covering Turkish circular welded carbon steel pipes and tubes. During the review, Commerce did not review information for plaintiff Tosçelik, a foreign producer and exporter, basing Tosçelik's countervailing duty margin instead on information submitted by another company. But Commerce calculated a *de minimis* countervailing duty rate for that company, and so, in accordance with its practice, Commerce used the rate that it had calculated for Tosçelik in the previous 2011 review. However, Tosçelik previously had successfully challenged the 2011 rate, and Commerce had changed that rate on remand. Tosçelik filed this action claiming that Commerce likewise should change the 2012 rate to reflect Commerce's change in the 2011 rate. The Court rejected the government's position that Tosçelik was precluded from making these arguments because, by failing to file an administrative case brief, it had failed to exhaust its administrative remedies. The Court remanded to Commerce to consider the application of the 2011 rate to the 2012 review.

Court of International Trade Sustains Commerce's Final Determination in an Antidumping Duty Investigation of Oil Country Tubular Goods from Saudi Arabia. *Boomerang Tube LLC,* et al *v. United States,* [Stanceu, C.J.]. On December 17, 2015, the Court of International Trade sustained Commerce's determination that Saudi Arabian producers of oil products had not sold those products in the United States at less than their fair value. Although the normal value is generally the price at which the merchandise is first sold in the exporting country (here, Saudi Arabia), Commerce determined that all of the producers' Saudi Arabian sales were unusable. It thus constructed the normal value using, among other data, producer's above-cost sales to Colombia. Plaintiffs, United States producers of oil products, challenged Commerce's method of constructing normal value. As an initial matter, the Court determined that plaintiffs had not failed to exhaust administrative remedies and therefore addressed the merits of their arguments. On the merits, the Court held that substantial evidence supported Commerce's finding that the distributor in Colombia was not part of a "single entity" with the Saudi producers. It also held that Commerce used a reasonable method in its calculation to determine whether sales were outside the ordinary course of trade.

Court of International Trade Dismisses for Lack of Standing Plaintiff's Challenge to Commerce's Antidumping Determination. *Jubail Energy Servs. Co. v. United States,* [Stanceu, C.J.]. On December 17, 2015, the Court of International Trade dismissed for lack of standing Saudi Arabian oil products producers' challenge to a Commerce determination. The Saudi producers filed suit challenging certain Commerce findings even though Commerce had terminated the antidumping duty investigation in the producer's favor. The Court dismissed for lack of standing,

holding that the producer had suffered no justiciable injury. Although the producer argued that it would be injured if the Court vacated Commerce's determination in in a different but related case, the Court deemed this a "hypothetical threat of injury" that did "not suffice" to establish standing.

Court of International Trade Sustains Commerce's Final Results of Countervailing Duty Investigation Covering Solar Cells from China. *SolarWorld Americas, Inc. v. United States* [Pogue, S.J.]. On December 11, 2015, the Court of International Trade sustained Commerce's final results of its countervailing duty investigation of Chinese crystalline silicon photovoltaic cells, *i.e.*, the solar cells used in solar panels that convert sunlight into electricity. The Court held that Commerce did not err by declining to evaluate and to investigate allegations of Chinese government subsidies on aluminum extrusions and rolled and patterned glass used in assembling solar cells into panels. The Court determined that Commerce acted in accordance with law when it found that the domestic producer's subsidy allegations were deficient. The Court also held that Commerce did not abuse its discretion when determining that it did not have sufficient time during the investigation to investigate these subsidy allegations, and that it was appropriate to postpone investigating those subsidies until the first administrative review of the order.

Feature Articles

Rules of Origin, Certifications of Origin and Customs Aspects of the Trans-Pacific Partnership (TPP) in 15 Points

Fernando Holguín Casas*

On February 4, 2016, the Trans-Pacific Partnership ("TPP") was executed by the 12 Parties in Auckland, New Zealand. From this date, the 12 countries including but not limited to Mexico, USA and Canada, must ratify the Agreement within a maximum period of two years. The TPP will enter into force 60 days following the date of ratification of all its members.

In the event that not all of the 12 countries ratify the Agreement within the aforementioned period, it will still enter into force provided that at least 6 of the 12 countries ratify said Agreement and; as long as the ratifying countries´ gross domestic product accounts at least 85% of the total gross domestic product of the 12 original Parties to the TPP.

Following, you will find a summary and general analysis on the main provisions on rules of origin, certification of origin and customs aspects of TPP, making in some cases a comparative analysis with the correlative provisions of NAFTA to include a familiar reference and aspects of possible controversies and co-existence with this Free Trade Agreement.

1. Initial provisions (Coexistence and Inconsistency with other FTA´s).

Intention to coexist with other agreements - Each member of this agreement

confirms that its existing rights and obligations under other international trade agreements in effect with any other country that is a Party of the TPP will remain in effect.

Inconsistency with other agreements - The TPP establishes in its Initial Provisions that if a Party considers one of its provisions inconsistent with a provision of another treaty previously concluded, the parties will find a solution by consulting the other a party to reach a mutual satisfactory solution.

There are different subjects that could generate conflict between the TPP and other FTA´s.

On such example is article 303 of NAFTA. Although it was discussed during the TPP negotiations to include an article with similar content to NAFTA´s 303, the final text does not reflect such provision, therefore, the restrictions of the aforesaid article may disappear between Canada, US and Mexico if import/export operations are carried out under the TPP instead of NAFTA, returning to the scheme that prevailed before January 2001, date that article 303 of NAFTA entered into effect. This provision is significantly relevant for US, and in general foreign companies manufacturing goods in Mexico under the Maquiladora/IMMEX scheme. This situation is addressed in detail below.

2. Originating goods.

Criteria granting origin to good - Under the TPP, the following criteria will grant origin to the goods:

(i) Goods wholly obtained or produced entirely in the territory of one or more of the parties (including wastes in the production of originating goods);
(ii) Goods produced entirely in the territory of one or more of the Parties exclusively from originating materials or;
(iii) Goods produced entirely in the territory of one or more of the Parties using non-originating materials, subject to compliance with specific rules of origin set out in Annex 3-D. This Annex is the equivalent to NAFTA Annex 401, which lists the specific rules of origin for each good.

3. Regional value content

Procedures for Calculating the Regional Value Content ("RVC").-RVC continues to play a significant role, especially where compliance with the specific rules of origin set out in Annex 3-D is required. Depending on the specific case, the RVC may be calculated through the following methods:

(i) Focused Value Method (Based on Value of Specified Non-Origin Materials);

(ii) Build-down Method: (Based on the value of non-originating materials including);

(iii) Build-up Method (Based on Value of Originating Materials);

(iv) Net Cost Method (exclusive for automotive goods).

4. Article 303 of NAFTA and similar provisions

Prohibitions under NAFTA´s article 303 - Although it was a subject included in the negotiation, it wasn't possible to reach consensus on the inclusion of an equivalent , which generally provides for the following restrictions:

(i) Non-originating products pay tariffs when the final products are destined to the territory of the other Parties.

(ii) Machinery and equipment cannot be exempted from payment of duties when intended for duty-deferral programs such as IMMEX.

5. Other aspects related to origin of goods under TPP

(i) Accumulation (in general is addressed in the same fashion as NAFTA);

(ii) *De Minimis* (TPP 10% TLCAN 7%);

(iii) Fungible Goods or Materials (same as NAFTA. Obligation to use inventory control methods in accordance to GAAP continues);

(iv) Accessories, Spare Parts, Tools and Instructional Materials (similar to NAFTA);

(v) Indirect Materials (also considered as originating regardless of production place);

(vi) Containers and Packaging Materials (are only consider the value when the qualification as an originating involving a requirement VCR);

(vii) Containers and packaging for shipment (not taken into account in determining the origin);

(viii) Transit and Transshipment. (Compared to NAFTA, an additional requirement to preserve its originating status under TPP is set out: the goods shall at all times remain under the control of the customs administration in the territory of a non-Party).

6. Certificates of Origin

No prescribed format is required unlike other free trade agreements such as NAFTA.

7. Origin Certification

(i) Importing Party makes the claim;

(ii) Claim is based on the certification of the exporter, producer or importer.

8. Non- compliance with origin certifications

An Importer Party may:

(i) Refuse the certification for non-compliance with the rules of origin;

(ii) Prohibit an importer to make subsequent certifications in case of non-compliance.

9. Other aspects of the origin certification and certificates of origin

(i) No need to prepare a prescribed format;

(ii) It shall be in writing, including electronic form;

(iii) It must specify that the good is originating and complies with rules and origin procedures;

(iv) Minimal information requirements;

(v) Can protect a shipment or multiple shipments not exceeding 12 months;

(vi) Valid for one year from the date of issuance;

(vii)English language is valid anywhere. If not in English, a translation must be submitted in the language of the importing party;

(viii) Imports of less than US$1,000.00 in customs value do not require a certificate of origin;

(ix) Where the importer of record realizes that a certification is incorrect, such party must make the correction and pay the owed amounts. There will be no sanctions when correction is spontaneous.

(x) Obligation of producer or exporter to notify immediately on incorrect certification.

(xi) Same legal consequences for the exporter or producer of record (not only the importer of record) in case of incorrect certification by producer or exporter of record. This represents an innovative step compared to NAFTA, where the importer of record is the exclusive Party subject to the adverse legal consequences of an incorrect certification, and, thus, disputes between importers and exporters/producers are usually resolved in courts.

10. Reasonable requirements of information for certificates of origin (Annex 3-B)

While there is no prescribed format for the Certificate of Origin, it must contain at least the following requirements described in Annex 3-B of the TPP.

(i) Whether the originating claim is based on the certification of origin of the exporter, producer or importer of record;

(ii) Information on Certifier;

(iii) Exporter´s Data;

(iv) Producer´s Data;

(v) Importer´s Data;

(vi) Description and tariff classification of the goods HS(6 digit level);

(vii)Origin Criterion;

(viii) Blanket period;

(ix) Authorized Signature and Date;

11. Basis for origin certification

On what grounds a party may certify the origin of goods under the TPP?

(i) Producer: On the basis of the producer having information that the good is originating;

(ii) Exporter: On the basis of the exporter having information that the good is originating; or; reasonable reliance on the producer's information that the good is originating.

(iii) Importer: On the basis of the importer having documentation that the good is originating or; reasonable reliance on supporting documentation provided by the exporter or producer that the good is originating.

TPP takes a next step compared to other FTA´s, requiring importer of record in all cases to have documental evidence for the certification of origin. Knowledge or reasonable information is not enough for the importer´s certification.

12. Discrepancies

Minor errors or discrepancies in the certificate of origin will not be a reason to reject the origin certificate.

While case law in Mexico in general supported this approach, the provisions of NAFTA and other trade agreements do not include a similar provision. The aforesaid situation has generated many controversies before the customs authorities in Mexico. In most cases, said authorities took a very formalistic approach invalidating certificates as a result of any formal mistake in the certificate, even if the mistake was not substantial or affected the substance of the certificate.

13. Obligations of importer of record.

(i) Make a declaration that the good qualifies as an originating good;

(ii) Have a valid certification of origin in its possession at the time the declaration;

(iii) Provide a copy of the certification of origin to the importing Party if required by the Party; and

(iv) If required by a Party to demonstrate that the requirements of Transit and Transshipment have been satisfied.

14. Record keeping.

(i) Shall be maintained for not less than 5 years;

(ii) The records include the documentation related to the importation, including the certification of origin that served as the basis for the claim; and all records necessary to demonstrate that the good is originating and qualified for preferential tariff treatment, if the claim was based on a certification of origin completed by the importer.

15. Origin Verifications.

For purposes of determining whether a good imported into its territory is originating, the Importing Party may verify a claim for preferential tariff treatment by submitting a written request for information from the importer,

exporter or producer of the good, or a visit to the premises of the exporter or producer of the good. In the case of textiles or apparel goods, an importing Party may conduct a specialized visit with more formalities than those stated for the ordinary visits, including among others presence of officials from the host Party.

** Fernando Holguín Casas is a Partner at EC Legal law firm in Mexico.*

CITBA Submits Comments on Proposed Federal Circuit Rules Change

In January, CITBA submitted comments on proposed changes to the rule of practice of the Court of Appeals for the Federal Circuit. Below is a copy of those comments.

January 4, 2016

Admiral Daniel E. O'Toole
Circuit Court Executive and Clerk of Court
717 Madison Place N.W.
Washington, D.C. 20005

Dear Admiral O'Toole:

The Customs and International Trade Bar Association (CITBA) respectfully submits the following comments on the proposed changes to the Circuit Rules. We have comments on the proposed changes to Rules 11, 17, 27, 28, and 30-all of which fundamentally change the Court's treatment of previously designated business proprietary information under Title 19 of the United States Code.

As we noted in our letter dated September 15, 2015, we understand and appreciate the Court's concerns about over-designation of confidential material but we remain concerned about the removal of the protections afforded by Rule 15(e). Both the Department of Commerce and the International Trade Commission are required by statute and regulation to keep confidential anything designated as proprietary (see 19 USC 1677f; 19 CFR 201.6, 207.7, and 210.5 (Commission regulations); and 19 CFR 351.105 and 351.304-306 (Commerce regulations)). These protections are critical to allow Commerce and the Commission to obtain the cooperation of parties responding to requests for confidential data. If the proposed rules are implemented, parties will have little reason to believe Commerce's and the Commission's assurances that their information will remain confidential. Additionally, the changes will impede parties' ability to make the necessary showing under the standard of review and thus frustrate the appeal process.

Our specific comments fall into two general categories-comments on the proposed limits to confidential information in briefs and motions, and comments on the proposed treatment of confidential information in the administrative record and appendices.

Word Limitation

The proposed change to Rule 27(m) limits the number of confidential "words" in any motion to 15. Rule 28(d) does the same for briefs. CITBA opposes any word limit first because it is inconsistent with the Court's standard of review and the parties' efforts to aid the Court in applying that standard. The Court's standard of review requires the Court to determine whether the administrative determination is supported by substantial evidence on the record. 19 U.S.C. 1516a(b)(1)(B). This in turn requires the parties to reference substantial portions of the administrative record to demonstrate why the agency determination is or is not supported by record evidence. Much of that information is subject to statutory and regulatory administrative protective orders. To limit the reference to record evidence undermines the parties' efforts to put forth their best arguments, and the Court's efforts to apply the standard of review properly.

Assuming the Court imposes a word limit, the limit should be higher to account for some appeals that by their very nature, concern significant confidential material. CITBA proposes a limit of 50 words and proposes that the limit not include confidential numbers (as the proposal is now written, it is unclear whether "words" includes numbers).

Without a higher word cap, we suspect parties will routinely ask the Court for permission to waive the limit, rendering the rule meaningless. Often, the relevant data in an appeal originates from companies who are not parties to the appeal but who have provided information in response to Commerce's requests during the administrative proceeding under the assumption that their data would remain confidential. In this common circumstance, no party to the appeal will be able to waive confidentiality on behalf of these companies, and the parties will need to ask the Court's permission to exceed the word limit. This imposes an unnecessary burden on the parties.

Finally, CITBA opposes the proposal to require parties to file a motion to exceed the word limit, whatever that limit may be. CITBA instead proposes that the Court require a certification in the body of the motion or brief itself explaining why the party has exceeded the limit. Motion practice to resolve this issue will just serve to lengthen the briefing process and create unnecessary process. And as the Rule is proposed, there is no indication under what standard such motions would be adjudicated-making it difficult for parties to justify their need to the Court.

Appendix-11(c), 17(e), 30(h)

The proposed changes to Rule 11(c), 17(e), and 30(h), state that "[m]aterial that has lost its coverage under a protective order under Federal Circuit Rule 11(c) or 17(e)-based on Federal Circuit Rules 30(h)(1)(B), 27(m)(1), or 28(d)(1) may not be marked confidential in appendices or addenda)."

CITBA opposes any rule that would affect the confidentiality designations in the administrative record and, by extension, in appendices. It is impossible for the parties to create new versions of documents that were created under statutory and administrative protective order restrictions. For example, if the parties waive confidentiality for a word that appears bracketed in a Commerce final decision, there is no way to reproduce that final decision with the word

unbracketed. To do so would undermine the integrity of the record. CITBA instead proposes that the appendix rules remain unchanged-allowing parties to cite portions of the administrative record as necessary for context and to allow the Court to apply the standard of review while respecting the parties' understandings under which the administrative was originally compiled by the agency. As long as the parties and the Court understand what material has lost its confidential designation in the briefs, there is no reason to change the documents in the administrative record to reflect that understanding.

Thank you very much for your consideration of these comments.

Sincerely,

Lawrence Friedman
President

JOB POSTINGS

U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement & Compliance
Attorney Positions
CC-TEC is seeking attorneys for permanent positions. Candidates should have a background in international trade, administrative law or litigation and, ideally, some knowledge of or demonstrated interest in antidumping and/or countervailing duty law. Applicants for permanent positions must be barred in at least one state or the District of Columbia and must be U.S. citizens. Applications should include a cover letter explaining their interest in CC-TEC, a resume, law school transcript, and writing sample (litigation sample if possible). Applications are accepted on a rolling basis and should be sent to CC-TEC's Hiring Attorney at "hiringattorney@trade.gov." NOTE: In the subject line of the e-mail, please state "Staff Attorney Position." E-mails that do not use this language may not be opened or considered in a timely manner. If an electronic version of one of these documents is unavailable, you may fax these items to the attention of the Hiring Attorney at (202) 482-4912 or (202) 501-8045.
For more information, visit the CC-TEC website at:
http://www.commerce.gov/os/ogc/trade-enforcement-and-compliance

Circuit Judge Evan Wallach of the Court of Appeals for the Federal Circuit is looking for a law clerk for the term mid-2017 to mid-2019. Candidates should have a profound interest in trade and customs law and policy. Judge Wallach has a strong preference for candidates who have clerked at the Court of International Trade, and then have worked in government or private practice for at least a couple of years. In addition to customs and trade, the candidate should have some interest in intellectual property as well, since that is the bulk of the work at the CAFC. Underrepresented minority and military veteran applicants are encouraged to apply. Letters of reference should be from people with whom they've worked or clerked. Submissions should include a CV, law school transcripts, at least three letters of reference and a legal writing sample, and can be made directly to his chambers:

Evan Wallach
Circuit Judge
Court of Appeals for the Federal Circuit
717 Madison Place NW
Washington, DC 20439

Sandler, Travis & Rosenberg, P.A. - Washington, DC
Attorney - International Trade Associate
Boutique, international trade law firm seeks international trade/trade remedies litigation associate. Candidate should have experience in antidumping and countervailing duty law, as well as, Court of International Trade experience. Preferred qualifications include:

- experience antidumping and countervailing duty investigations and administrative reviews;

- experience with litigation before the Court of International Trade and Court of Appeals for the Federal Circuit;

- knowledge of U.S. Customs laws;

- strong legal research and writing skills;

- J.D, LL. B. or LL.M degrees from a law school accredited by the ABA; and

- Membership of a Bar and in good standing.

Please send resume to: pmoon@strtrade.com

CITBA ONLINE

Please look for further announcements and copies of past newsletters at: http://www.citba.org/

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